122

No.

IN THE
Supreme Court of the United States

ENTEC CORPORATION, ET AL.,
Petitioners
v.

CENTRO DE RECAUDACIÓN DE INGRESOS MUNICIPALES,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PUERTO RICO

PETITION FOR A WRIT OF CERTIORARI

RAMÓN E. DAPENA
Counsel of Record
EDGARDO CARTAGENA
VÍCTOR J. QUIÑONES
USERA MORELL BAUZA
DAPENA & CARTAGENA LLP
P.O. Box 13399
San Juan, P.R. 00908
(787) 725-8080
Attorneys for Petitioners

QUESTIONS PRESENTED

1. Is Section 2 of the Federal Arbitration Act applicable to an unicorporated territory (such as the Commonwealth of Puerto Rico), in the same way it applies to the fifty states of the Union?

2. Can the court system of an unincorporated territory (such as the Commonwealth of Puerto Rico) ignore or obviate an arbitration clause within a contract to adjudicate a controversy thereunder in the Commonwealth's court system?

3. Does the doctrine of the "law of the case" allow the court system of an unincorporated territory (such as the Commonwealth of Puerto Rico) to disregard conflicting opinions of this Court on questions of federal law, such as the doctrine set forth in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, infra, and *Buckeye Check Cashing, Inc. v. Cardegna*, infra, in the context of a commercial dispute under a contract containing an arbitration clause?

PARTIES TO THE PROCEEDING

Petitioners ENTEC Corporation ("ENTEC"), Consulta Economica y Planificacion Inc. ("CEPI"), Habibe Enterprises Inc., Creative Consulting Inc. formerly Active Consulting Inc., Venture Technologies Group formerly Habibe Computer Corp., Geotel Inc. formely Woolpert Puerto Rico, Inc. are corporations organized under the laws of the Commonwealth of Puerto Rico. There are no publicly held companies owning 10% or more of these corporations. Their shares of stock are owned by Petitioners Tommy Habibe R. Arrias and/or Tommy O. Habibe Vargas, who along with Mrs. Habibe Vargas are U.S. citizens residing in the Commonwealth of Puerto Rico.

Respondent Centro de Recaudaciones de Impuesto Municipal ("CRIM"), is a quasi public corporation entrusted with assessing and collecting property taxes and, among others, distributing its revenues among the municipalities (counties) of the Commonwealth of Puerto Rico.

Other parties named in the complaint, though not participating in the appeal proceedings, are: Hector Luis Rivas y Asociados ("HLRA"), Hector Luis Rivas Colon along with Mrs. Rivas Colon, John Paul Stephens Rexach along with Mrs. Stephens Rexach, Eduardo Burgos Negron along with Mrs. Burgos Negron, Candida Rodriguez Larrendowtte, Wanda Rodriguez Hernandez, Bernardo Negron Montalvo along with Mrs. Negron Montalvo, Carlos Serra Velez along with Mrs. Serra Velez, and Margarita Sanfeliz Wu along with her husband Benjamin Wu.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Constitutional Provisions

Statutes

Treatises

OPINIONS BELOW

The opinion and resolution of the Court of First Instance of the Commonwealth of Puerto Rico denying Petitioners' motion to dismiss for lack of jurisdiction pursuant to *Buckeye*, infra, is unreported. It is included in the Appendix at p. 1A. The opinion and judgment of the Court of Appeals of the Commonwealth of Puerto Rico is recorded at 2008 WL 2168700. It is included in the Appendix at p. 99A. The resolution of the Supreme Court of the Commonwealth of Puerto Rico denying review is unreported. It is included in the Appendix at p. 134A. All opinions were rendered in the Spanish language and their unofficial certified translations have been included in the Appendix to this Petition.

JURISDICTION

The resolution of the Court of First Instance of the Commonwealth of Puerto Rico which denied Petitioners' motion to dismiss pursuant to *Buckeye*, infra, was entered on July 24, 2007, and appealed on August 23, 2007. The judgment of the Court of Appeals of the Commonwealth of Puerto Rico was entered on May 2, 2008, and reconsideration denied on June 5, 2008. It was appealed on July 7, 2008. The judgment of the Supreme Court of the Commonwealth of Puerto Rico was entered on December 4, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1258.

RELEVANT PROVISIONS

The primary statute involved is Section 2 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 2, which reads:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

The primary constitutional provision involved is Clause 2 of Article VI of the United States Constitution, known as the Supremacy Clause, U.S. Const. Art. VI Cl. 2, which reads:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the

Constitution or Laws of any State to the Contrary notwithstanding.

STATEMENT OF THE CASE

Petitioner ENTEC and Respondent CRIM entered into an agreement to design and establish a digitally computerized Land Information Management System (the "LIMS contract") on July 20, 1995. See Appendix at p. 472B. The LIMS contract has an arbitration clause. See Appendix at pp. 473-474B. Petitioner undertook the task assigned and continued until the Respondent CRIM suspended activities under the LIMS contract. Petitioners ENTEC and CEPI, along with HLRA, filed for arbitration for the balance due and damages, with the American Arbitration Association as per Section 22 of the LIMS contract. See Appendix at p. 474B.

Before a panel of 3 arbiters, Respondent CRIM "engaged" by responding to the claim and undertaking discovery. Ten months after "engaging" CRIM sought an injunction with the Court of First Instance of the Commonwealth of Puerto Rico (the "CFI") alleging that the LIMS contract was void due to fraud. See Appendix at p. 474-477B. Petitioners objected raising the arbitration clause, Section 2 of the FAA and *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967). See Appendix at p. 134B. The CFI enjoined the arbitration (See Appendix at p. 141A.) and the Court of Appeals of the Commonwealth of Puerto Rico upheld, 2002 WL 32131029, declining to apply *Prima Paint's* rule of severability based on a distinction between void and voidable contracts and concluding that: "...[I]t is evident that the

controversy in the present case, regarding the allegation of nullity of the LIMS contract, should be resolved in the first instance by the judicial forum." Appendix at p. 242A.

On December 13, 2005, the CFI entered summary judgment against Petitioners declaring the LIMS contract, and consequently its arbitration clause, null and void *ab initio*. See Appendix at p. 248A. No reference was made to the arbitration question or *Prima Paint* even though the affirmative defense had been raised and argued before the CFI. Two months later, and while the CFI considered several post-judgment motions, this Court issued its decision in *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (2006), which directly contradicted the rulings of the CFI and the P.R. Court of Appeals as to the arbitration question during the early stages of the case by finding that: "We reaffirm today that, regardless of whether the challenge is brought in federal or state court, a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator." 546 U.S. at 449, 126 S.Ct. at 1210. In doing so, *Buckeye* specifically rejected the distinction between void and voidable contracts made by the P.R. Court of Appeals.

Following the pronouncement of this Court, Petitioners once again requested the CFI to dismiss the case for lack of jurisdiction[1] in view of the

---

[1] Under both Puerto Rico and Federal law, a litigant may raise a court's lack of jurisdiction at any time in the same civil action, even initially at the highest appellate instance. See *Vázquez v. A.R.P.E.*, 128 D.P.R. 513, 537 (1991) and *Kontrick v. Ryan*, 540 U.S. 443, 455, 124 S.Ct. 906, 915 (2004). In the case at bar the issue was raised with the CFI.

clarified legal doctrine which mandates the arbitrator to resolve the matter of nullity as opposed to the judicial forum. On July 24, 2007 the CFI entered a resolution denying Petitioners' renewed jurisdictional challenge as contrary to the (erroneous) law of the case which was established by the earlier ruling of the P.R. Court of Appeals. See Appendix at p. 89-96A. The P.R. Court of Appeals upheld again ignoring "the supreme law of the land." See Appendix at p. 99A. The matter was brought to the Supreme Court of the Commonwealth and again the issue ignored. See Appendix at p. 134A.[2] In all instances, specific errors were assigned and arguments presented on the arbitration question and engagement on the part of Respondent but to no avail.

We part from the premise that the courts of the Commonwealth of Puerto Rico are conversant with the FAA. See, e.g., *Medina v. Cruz Azul de P.R.*, 155 D.P.R. 735 (2001); *World Films, Inc. v. Paramount Pict. Corp.*, 125 D.P.R. 352 (1990); *Walborg Corp. v. Tribunal Superior*, 104 D.P.R. 184 (1975). The applicable case law, *Prima Paint* and *Buckeye*, was briefed at all court levels. We can only infer an element of hostility against individual Petitioners based on their extortion convictions. The Habibes

---

[2] The appellate courts ignored *Buckeye's* implicit overruling of the "law of the case" in the present litigation by conveniently tying the motion to dismiss for lack of jurisdiction to a separate motion for reconsideration of the summary judgment, which the CFI had ruled as academic for being filed late. However the CFI did not characterize the separate motion to dismiss as such, to the contrary, it recognized that the issue of lack of jurisdiction could be raised at any time during the proceedings and addressed the merits of Petitioners' contentions regarding *Buckeye*. See Appendix at pp. 89-96A.

(but not petitioner corporation ENTEC) were convicted for participating in an extortion scheme wherein the Executive Director of the CRIM and other public officials would extort moneys from the Habibes in order to issue scheduled payments under the LIMS contract. Besides that, we can only attribute the insensibility to the arbitration argument to a sense of independence within the federal system not yet recognized by Congress to unincorporated territories, such as the Commonwealth of Puerto Rico.

REASONS FOR GRANTING THE WRIT

There is no question that the LIMS contract, and its arbitration clause, are within the purview of the FAA. Hence the matter of the applicability of the FAA, *Buckeye and Prima Paint* to the case of reference constitutes an argument of lack of jurisdiction of the courts over the controversy arising from the LIMS contract. As previously mentioned, the question of jurisdiction may be raised at any time during the proceedings by any of the parties or by the court on its own. See *Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567, 571, 124 S.Ct. 1920, 1924, 158 L.Ed.2d 866 (2004). Petitioners first raised the defense of lack of jurisdiction and application of the FAA before answering the complaint, in their opposition to Respondent's request for injunctive relief and counter request to compel arbitration. See Appendix at pp. 169-188B. The defense was also raised in the answer to the second amended

complaint.[3] See Appendix at pp. 436-437B. Likewise before the P.R. Court of Appeals. See Appendix at pp. 224-226A. Most recently, Petitioners reaffirmed the defense of lack of jurisdiction and applicability of the FAA through the dismissal motion of May 30, 2006 when the litigation continued before the CFI. See Appendix at p. 91A.

In its Resolution of July 24, 2007, the CFI, after addressing the merits of Petitioners' argumentation, denied the dismissal motion for lack of jurisdiction following *Buckeye* because, allegedly, it was contrary to the law of the case. See Appendix at pp. 93-93A. In turn, the P.R. Court of Appeals and the P.R. Supreme Court denied correcting this erroneous conclusion.

The argument of lack of jurisdiction over the matter is based on the Supremacy Clause of the Federal Constitution, U.S. Const. Art. VI, Cl. 2. When Congress speaks on a subject within its purview, state courts may not act to obstruct or unsettle the congressional design. See *Key v. Wise*, 454 U.S. 1103, 1109, 102 S.Ct. 682, 685, 70 L.Ed.2d 647 (1981) (Brennan, J., dissenting). By constitutional order, the state courts are bound by this Court's decisions on issues concerning the construction and effect of federal legislation such as the FAA. *State of South Carolina v. Bailey*, 289 U.S. 412, 420, 53 S. Ct. 667, 670, 77 L.Ed. 1292 (1933). The decisions of this Court on federal questions are absolutely binding on the state courts and must be followed, regardless of those courts' views.

---

[3] Due to various procedural events at the beginning of this litigation, Petitioners did not respond to the lawsuit until December 15, 2004. Respondent amended the complaint prior to Petitioners filing their initial answer.

Chesapeake & O. Ry. Co. v. Martin, 283 U.S. 209, 221, 51 S. Ct. 453, 458, 75 L.Ed. 983 (1931). Thus, when interpreting federal law, a state court is bound by this Court's current explication of it. *Prima Paint* and, more recently, *Buckeye* are (i) opinions of this Court that go to the core of the controversy in the case of reference, and (ii) irreconcilable with the decisions of the P.R. Court of Appeals of October 31, 2002 and May 2, 2008, and of the CFI of July 24, 2007. If *Prima Paint*, was not enough to persuade the CFI and the P.R. Court of Appeals over the lack of jurisdiction as of October 31st, 2002, certainly *Buckeye* clears any possible misunderstanding and directs the controversy to arbitration.

Nevertheless, to evade *Buckeye*, the CFI adopted the proposal of Respondent: the doctrine of the "law of the case". This position of the CFI presents a significant problem, namely that the doctrine of the law of the case yields before case law such as *Buckeye*. The law of the case is a doctrine that provides that "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Arizona v. California*, 460 U.S. 605, 618, 103 S.Ct. 1382, 1391, 75 L.Ed.2d 318 (1983). "The doctrine prevents the relitigation of settled issues in a case, thus protecting the settled expectations of parties, ensuring uniformity of decisions, and promoting judicial efficiency." [4] *Little Earth of the United Tribes,*

---

[4] The Commonwealth court system is not so appreciative of the law of the case doctrine. See, e.g., *M.A.S.C. v. E.L.A.*, 152 D.P.R. 599, 608 (2000); *Noriega Rodriguez v. Hernández Colon*, 130 D.P.R. 919, 931 (1992); *Pueblo v. Lebron*, 21 P.R. Offic. Trans. 144, 149, 121 D.P.R. 154, 159 (1988); *Torres Cruz v. Municipio de San Juan*, 3 P.R. Offic. Trans. 302, 103 D.P.R. 217, 222

Inc. v. United States Dep't of Housing & Urban Dev., 807 F.2d 1433, 1441 (8th Cir.1986). However, the law of the case does not apply when an intervening decision from a superior tribunal clearly demonstrates the law of the case is wrong. See *Pescatore v. Pan American World Airways, Inc.*, 97 F.3d 1, 7–12 (2nd Cir. 1996); *Morris v. American Nat. Can Corp.*, 988 F.2d 50 (8th Cir. 1993); *Dean v. Trans World Airlines, Inc.*, 924 F.2d 805, 810 (9th Cir.1991); *Miles v. Kohli & Kaliher Assocs., Ltd.*, 917 F.2d 235, 241 n. 7 (6th Cir. 1990); *Barrington Press, Inc. v. Morey*, 816 F.2d 341, 342 n. 2 (7th Cir. 1987), cert. denied, 484 U.S. 906, 108 S.Ct. 249 (1987); *Laffey v. Northwest Airlines, Inc.*, 740 F.2d 1071, 1089 (D.C. Cir. 1984) (per curiam), cert. denied, 469 U.S. 1181, 105 S.Ct. 939 (1985). In this case, *Buckeye* is such a decision. See *Wright, et al.*, Federal Practice and Procedure Jurisdiction 2d. §4478, pages 672-676; Moore's Federal Practice 3d, § 134.21 [3] [b].[5]

Moreover the CFI invocation of the law of the case presents a problem of juridical analysis since there cannot be jurisdiction where none exists. A court must have "adjudicatory authority over the subject matters and parties governed by the judgment" if its decision is to be given weight in a later proceeding. *Baker v. General Motors Corp.*, 522 U.S. 222, 233, 118 S.Ct. 657, 663-664, 139 L.Ed.2d 580 (1998).

(1975). Curious that such a weak doctrine found a new calling; raising to the task of "blocking" the law of the land.

[5] "When in the interim between the first and the second decisions of the lower court, a higher court to which the court owes obedience issues an opinion directly on point and irreconcilable with the earlier decision, the court is to disregard the law of the case and is to apply the new precedent." Moore's Federal Practice 3d, §134.21 [3] [b].

Therefore, the judgment of a court lacking jurisdiction over the subject matter of the litigation or the parties is void. *Burnham v. Superior Court of California, County of Marin*, 495 U.S. 604, 608-609, 110 S.Ct. 2105, 109 L.Ed.2d 631 (1990). Logic dictates that the law of the case doctrine likewise cannot apply when a court enters judgment without jurisdiction over the subject matter of the litigation or the parties involved. The inexorable premise of the doctrine of the law of the case is that a case exists. If there is no jurisdiction, there is no case to apply the referred doctrine. After *Prima Paint and Buckeye*, there is no doubt that the courts lack jurisdiction over the matter to resolve the nullity *ab initio* of a contract that includes an arbitration clause. *Buckeye* cleared up any threat of doubt and confirmed the supreme law of the land—the FAA—that the arbitrator is the one whom should decide if a contract with an arbitration clause is valid or null, not the courts.

It is an indisputable fact that the P.R. Court of Appeals concluded that what is in controversy in this case is the challenging of the contract between the parties (v.g., the nullity *ab initio*) and that the arbitration clause would follow the contract's fate. See Appendix at pp. 226-237A. The challenge is not specifically to the arbitration clause but instead stems from the premise that the document, in its entirety, is not a valid contract. But upon interpreting the FAA, in *Buckeye* this Court reaffirmed *Prima Paint*, pronouncing: "We reaffirm today that, regardless of whether the challenge is brought in federal or state court, a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the

arbitrator." *Buckeye*, 546 U.S. at 449, 126 S.Ct. at 1210. The pronouncement of this Court, first in *Prima Paint* and then in *Buckeye*, is the only possible law of the case. It is necessary to conclude that the present case should have continued before the arbitration panel and that it was erroneously channeled through the court system.

As discussed above, under the Supremacy Clause the state courts are bound to this Court's interpretation of the Federal Constitution and Laws. Certainly, the P.R. Supreme Court is afforded deference on matters of purely local concern. See *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 339 n.6, 106 S.Ct. 2968, 2976 n.6, 92 L.Ed.2d 266 (1986). Presumably, they may also interpret questions of federal law which have not been conclusively addressed by this Court, as is the case with the courts of the states. See *Lockhart v. Fretwell*, 506 U.S. 364, 376, 113 S.Ct. 838, 846, 122 L.Ed.2d 180 (1993) (Thomas, J., concurring). But the Commonwealth of Puerto Rico is not entitled to a special exemption from the Supremacy Clause. See *Puerto Rico Dept. of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 499, 108 S.Ct. 1350, 1353, 99 L.Ed.2d 582 (1988). In any case, as a creature created by congressional fiat it is subject to the plenary powers of the Congress which enacted the FAA and the national policy in favor of arbitration. See *Harris v. Rosario*, 446 U.S. 651, 651-652, 100 S.Ct. 1929, 1930 64 L.Ed.2d 587 (1980) (characterizing Puerto Rico as subject to the Territorial Clause of the Constitution, U.S. Const. Article IV, §3). See also *Balzac v. Porto Rico*, 258 U.S. 298, 42 S.Ct. 343, 66 L.Ed. 627 (1922) (describing Puerto Rico as an unincorporated

territory of the United States); *Torres v. Puerto Rico*, 442 U.S. 465, 99 S.Ct. 2425, 61 L.Ed.2d 1 (1979) (same). While Puerto Rico may be deemed to enjoy a particular status within the union, this Court and not the Puerto Rico commonwealth courts, is the final arbiter on federal questions arising in the island. See *Arizona v. Evans*, 514 U.S. 1, 9, 115 S.Ct. 1185, 1190, 131 L.Ed.2d 34 (1995).[6]

Thus, if this Court abstains from reviewing the decisions of the P.R. Court of Appeals and P.R. Supreme Court, which left undisturbed the CFI's refusal to follow *Buckeye*, it would risk creating the impression that Puerto Rico may treat the FAA differently than the rest of the nation or that it is exempt from adhering to the supreme law of the land. The consequence would be that agreements to arbitrate disputes passed on by the commonwealth courts are afforded little or no FAA protection and that the national policy favoring arbitration embodied in Section 2 is weaker in the island.

To conclude, following the FAA and the unequivocal pronouncement of *Prima Paint* and *Buckeye*, this Court will find that it should grant certiorari to correct the conflict arising from the appealed decisions and reverse the decisions of the P.R. Supreme Court, the P.R. Court of Appeals and the CFI. Consequently this case should be returned to the constituted arbitration panel that had been entertaining the controversy since September 20, 2000. See Appendix at p. 474B.

---

[6] Even the P.R. Supreme Court recognizes so. See, e.g., *World Films, Inc.*, 125 D.P.R. at 353-354 (recognizing the binding effect of this Court's rulings on matters pertaining to the FAA).

CONCLUSION

For the forgoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

RAMÓN E. DAPENA
EDGARDO CARTAGENA
VÍCTOR J. QUIÑONES
USERA MORELL BAUZA
DAPENA & CARTAGENA LLP
P.O. Box 13399
San Juan, P.R. 00908
(787) 725-8080